

M/S. SEEMA SILK & SAREES & ANR. A

v.

DIRECTORATE OF ENFORCEMENT & ORS.

(Criminal Appeal No. 860 Of 2008)

MAY 12, 2008 B

**[S.B. SINHA AND LOKESHWAR SINGH PANTA, JJ.]**

*Foreign Exchange Regulation Act, 1973 – s.18(2) and (3) – Payment of exported goods – Exporter unable to repatriate the export proceeds – Constitutional validity of s.18(2) and (3) – Challenge to – Held: Provisions are constitutionally valid – Act is protected under Article 31B having been placed in Ninth Schedule of the Constitution – Domestic trades and exporter stands on different footing – Discrimination on the ground of valid classification based on intelligible differentia is not ultra vires Article 14 even though hardship may be caused – Reverse burden of proof also does not render it unconstitutional – Further, the said provision not ultra vires being contrary to accounting practice – On facts, no case made out that the Act was confiscatory in nature – Neither foundational fact brought on record nor pleaded – In absence thereof, provision cannot be rendered ultra vires – Since submissions whether exporters committed any offence or not would remain open, order of High Court upholding constitutionality of s. 18(2) and (3) not to be interfered with – Constitution of India, 1950 – Article 14.* C D E

**Appellant no.1 is a partnership firm and appellant no.2 is its partner. It is alleged that appellants-exporters could not repatriate the value of goods from the export proceeds. The Enforcement Directorate issued notice u/ s. 18(2) and (3) of the Foreign Exchange Regulation Act, 1973. The appellants furnished the details of repatriation they could bring about as also step taken by them. The Bank did not grant the appellants extension of time for repatriation of export and filed suit against them before** F G H

A the tribunal. The Enforcement Directorate imposed penalty. Aggrieved, appellant filed appeal and the same was allowed. The Enforcement Directorate filed appeal. However, High Court did not stay the order. A criminal case was also initiated. The appellants filed application for quashing of the criminal proceedings pending against them. The application was disposed of as the appellants had already filed application for discharge. The application for discharge was dismissed later. The appellants filed writ petition questioning the constitutionality of s. 18(2) and 18(3) of the Act as also constitutional validity of the Constitution 39th Amendment Act. The writ petition was dismissed. Hence the present appeal.

Dismissing the appeal, the Court

D HELD: 1.1 The Foreign Exchange Regulation Act, 1973 is protected under Article 31B of the Constitution of India having been placed in the Ninth Schedule thereof, even otherwise, there is no reason to arrive at a conclusion that the Act is ultra vires Article 14 of the Constitution. A discrimination on the ground of valid classification which answers the test of *intelligible differentia* does not attract the wrath of Article 14 of the Constitution of India. Hardship, by itself, may not be a ground for holding the said provision to be unconstitutional. (Paras 11 and 12) [208-G; 209-A-B]

F *Ajoy Kumar Banerjee v. Union of India* (1984) 3 SCC 127 – referred to.

G 1.2 No case has been made out that the Act is confiscatory in nature. No foundation fact has also been brought on record. Appellants have not annexed even a copy of the writ petition. The counsel has not been able to satisfy that there existed any factual foundation in support of his argument. In absence of such factual foundation having been pleaded, no case has been made out for declaring H the said provision ultra vires the Constitution of

India.(Paras 13 and 14) [209-F.G; 210-G]

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*Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO (2007) 5 SCC 447 – referred to.*

1.3 A domestic trader and an exporter stand on different footings. The said provisions were made when the country was undergoing severe 'foreign exchange crunch'. The Parliament in its wisdom has inserted the said provisions so as to prevent fraud. Section 18(1) of the Act provides for filing of an application for grant of exemption by the Reserve Bank of India. Refusal to give such an exemption is required to be preceded by reasonable opportunity of making a representation. (Para 15) [210-H;211-A-B]

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1.4 A legal provision does not become unconstitutional only because it provides for a reverse burden. The question as regards burden of proof is procedural in nature. The presumption raised against the trader is a rebuttable one. Reverse burden as also statutory presumptions can be raised in several statutes. Presumption is raised only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. In a case of this nature, particularly, when an appeal against the order of the Tribunal is pending, that the appellants are not entitled to take the benefit thereof at this stage. Such contentions must be raised before the criminal court. (Paras 16 and 17) [211-B-E]

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1.5 Commercial expediency or auditing of books of accounts cannot be a ground for questioning the constitutional validity of a Parliamentary Act. If the Parliamentary Act is valid and constitutional, the same cannot be declared ultra vires only because the appellant faces some difficulty in writing off the bad debts in his books of accounts. He may do so. But that does not mean the statute is unconstitutional or the criminal prosecution becomes vitiated in law. (Para 18) [211-FG]

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A 1.6 An order of discharge can be interfered with by High Court on limited grounds. At that stage, it need not be shown that the appellants may not ultimately be convicted. It is enough if there exists a strong suspicion. The factual matrix involved in the matter is one of the accounting. The burden being on appellants to show that they had taken all permissible steps as are provided for under the law, the question of passing any order of discharge at this stage would not arise. (Paras 19 and 20) [211-G-H; 212-A-B]

C 1.7 The export was to the tune of US \$ 55,03,218.78. Appellants on their own showing exported goods to the developed countries. They did not obtain any general or special permission from the Reserve Bank of India for non-realisation of export proceeds beyond six months which is the period specified u/s 18 of the Act. (Para 21) [212-B-C]

D 1.8 As all contentions as to whether the appellants have committed any offence or not shall remain open no case has been made out for interference of the impugned judgment. (Para 22) [212-D]

E CRIMINALAPPELLATE JURISDICTION : Criminal Appeal NO. 860 of 2008

From the final Judgment & Order dated 30.7.2007 of the High Court of Judicature at Bombay in CrI. Writ Petition No. 336 of 2007

F Mathews J. Nedumpara and, S. Usha Reddy for the Appellants.

G.E. Vahanbvati, SG, Rajni Singh, Sushil Kr., B.V. Balaram Das and Ravindra Keshavrao Adsure for the Respondents.

G The Judgment of the Court was delivered by

**S.B. SINHA, J** : 1. Leave granted.

H 2. Constitutionality of Sub-sections (2) and (3) of Section 18 of the Foreign Exchange Regulation Act, 1973 (for short "the Act") is in question in this appeal which arises out of a judgment

and order dated 30.07.2007 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 336 of 2007. A

3. Appellant No. 1 herein is a partnership firm and Appellant No. 2 is its partner. Appellant No. 1 used to export garments and textiles to various countries. It allegedly could not repatriate the value of goods from the export proceeds. According to the appellants, whereas export to developed economies like US, UK, Europe and Japan, on credit basis, does not undergo severe competition and very minimal profit margin can be maintained, export to the less developed countries or the countries with poor legal system earn greater profit margin. B C

4. Appellants' business allegedly came to a standstill because of its inability to repatriate export proceeds to the tune of 16.5 crores from a few overseas buyers. A notice was issued by the Enforcement Directorate under Sections 18(2) and 18(3) of the Act alleging that in view of their failure to repatriate the entire sale proceeds of the exports which the appellants have made during 1997-98, the said provision is attracted. D

They, in the cause shown, allegedly furnished details of repatriation they could bring about as also the steps taken by them in that behalf. They applied for extension of time through the authorized dealer, viz., the Canara Bank. However, with the passage of time, the Branch Manager of the Bank did not grant any extension of time for repatriation of the export proceeds. A suit was also filed by the Canara Bank before the Debt Recovery Tribunal, Mumbai. E F

5. The Enforcement Director, in the aforementioned proceedings, imposed a penalty of Rupees One Crore on the firm and Rs.25 lakhs each on the partners. An appeal preferred by the appellants before the Appellate Tribunal was allowed holding that the appellants have taken all reasonable steps for repatriation. A further appeal was taken by the Enforcement Directorate before the High Court which was marked as FA Nos. 8 and 9 of 2005. However, the High Court although entertained the appeal, did not pass any order of stay. G H

A 6. A criminal case was also initiated. Cognizance thereon  
was taken and the appellants were summoned by an order dated  
19.06.2004 by the Chief Metropolitan Magistrate, Esplanade  
Court, Mumbai. Appellants thereafter filed a criminal applica-  
tion bearing No. 6901 of 2005 for quashing of the criminal pro-  
ceedings pending against them. The said application was dis-  
posed of by an order dated 26.07.2006 observing that as the  
B appellants had already filed application for discharge, the  
learned Magistrate may pass appropriate order thereupon.

C By an order dated 10.10.2006, the said application for  
discharge was dismissed. It was inter alia contended by the  
appellants in the said discharge application that the order of  
Tribunal being civil in nature, the same was binding on the crimi-  
nal court and, thus, the prosecution against them under Section  
56 of the Act for was not maintainable. The order taking cogni-  
D zance having been passed on 27.05.2002, the same was con-  
tended to be bad in law.

E 7. Appellants preferred writ petition thereagainst question-  
ing the constitutionality of Sections 18(2) and 18(3) of the Act  
as also constitutional validity of the Constitution 39<sup>th</sup> Amend-  
ment Act. By reason of the impugned judgment, the said writ  
petition has been dismissed.

F 8. Mr. Mathews J. Nedumpara, learned counsel appear-  
ing on behalf of the appellants, would submit that Sections 18(2)  
and 18(3) of the Act placing the burden of proof upon the ac-  
cused must be held to be a law having draconian character and,  
thus, is unconstitutional.

G It was submitted that by reason of the said provision, dis-  
crimination has been made between a domestic trader and an  
exporter and, thus, the same is violative of Article 14 of the Con-  
stitution of India.

H It was urged that validity of the said provision must be  
judged on the touchstone of commercial considerations inas-  
much as whether an exporter may not be able to repatriate the

export proceeds particularly when such exports are made to the developing countries. The learned counsel would contend that all traders in terms of the provisions of the Income Tax Act, 1961 make a provision for bad debt. When a trader suffers loss, it is permissible to make a provision for writing off such bad debts. It was furthermore urged that in terms of the provisions of the Income Tax Act, the accounts are required to be audited by a Chartered Accountant and, thus, the impugned law being contrary to the accounting practice should not be sustained. Such repatriation of exports proceeds, thus, being uncertain, it was urged, the impugned provisions as also the Constitution 39<sup>th</sup> Amendment Act cannot be sustained.

9. Mr. G. E. Vahanvati, learned Solicitor General appearing on behalf of the respondents, on the other hand, would submit that a domestic trader and an exporter belong to different classes and such classification, being valid, the impugned provisions are not ultra vires Article 14 of the Constitution of India.

It was pointed out that having regard to the nature of business and the risk involved in the export of commodities, the appellant could approach the Reserve Bank of India for grant of exemption and in that view of the matter it does not cause even any hardship to any individual.

10. Sections 18(2) and 18(3) of the Act reads as under:

"18. Payment for exported goods:

(1) \*\*\*

(2) Where any export of goods, to which a notification under clause (a) of sub-section (1) applies, has been made, no person shall, except with the permission of the Reserve Bank, do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

(A) in a case falling under sub-clause (i) or sub-clause (ii) of clause (a) of sub-section (1),-

(a) that payment for the goods -

- A            i.     is made otherwise than in the prescribed manner, or
- ii.     is delayed beyond the period prescribed under clause (a) of sub-section (1), or

B            (b) that the proceeds of sale of the goods exported do not represent the full export value of the goods subject to such deductions, if any, as may be allowed by the Reserve Bank; and

C            (B) in a case falling under sub-clause (ii) of clause (a) of sub-section (1), also that the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade: Provided that no proceedings in respect of any contravention of the provisions of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full export value has not been made in the prescribed manner within the prescribed period.

D            (3) Where in relation to any goods to which a notification under clause (a) of sub-section (1) applies the prescribed period has expired and payment therefor has not been made as aforesaid, it shall be presumed, unless the contrary is proved by the person who has sold or is entitled to sell the goods or to procure the sale thereof, that such person has not taken all reasonable steps to receive or recover the payment for the goods as aforesaid and he shall accordingly be presumed to have contravened the provisions of sub-section (2)."

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G            11. Admittedly, the Act finds place in the Ninth Schedule of the Constitution of India. In terms of Article 31B of the Constitution of India inter alia none of the Acts specified in the Ninth Schedule is ultra vires even if it is inconsistent with or takes away or abridges any of the rights conferred by any provisions of Part III of the Constitution of India.

H            12. Appellants have questioned the validity of the Act only



on the ground of infringement of Article 14 of the Constitution of India. Apart from the fact that the Act is protected under Article 31B of the Constitution of India having been placed in the Ninth Schedule thereof, even otherwise, we do not find any reason to arrive at a conclusion that the Act is ultra vires Article 14 of the Constitution of India. A discrimination on the ground of valid classification which answers the test of *intelligible differentia* does not attract the wrath of Article 14 of the Constitution of India. Hardship, by itself, may not be a ground for holding the said provision to be unconstitutional.

In *Ajoy Kumar Banerjee v. Union of India* [(1984) 3 SCC 127], this Court held:

"50. Differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution. This principle is too well-settled now to be reiterated by reference to cases. There is intelligible basis for differentiation. Whether the same result or better result could have been achieved and better basis of differentiation evolved is within the domain of legislature and must be left to the wisdom of the legislature. Had it been held that the scheme of 1980 was within the authority given by the Act, we would have rejected the challenge to the Act and the scheme under Article 14 of the Constitution."

13. No case has been made out that the Act is confiscatory in nature. No foundation fact has also been brought on record.

Appellants have not annexed even a copy of the writ petition. The learned counsel has not been able to satisfy us that there existed any factual foundation in support of his argument.

In *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO* [(2007) 5 SCC 447], this Court held:

"69. The issue that the 2003 Act is in violation of the

A equality clause contained in Article 14 of the Constitution  
of India was not raised before the High Court. Only in one  
of the civil appeals, prayer was made for urging additional  
ground and the same having been directed, additional  
B ground has been taken to urge the said question. A ground  
taken, however, must be based on a factual foundation.  
For attracting Article 14, necessary facts were required to  
be pleaded. The foundational facts as to how Section 14  
of the 2003 Act would be discriminatory in nature have not  
C been stated at all. The Government of Tamil Nadu has  
also not been given any opportunity to meet the said  
contention.

70. It is now trite that such factual foundation, unless is  
apparent from the statute, itself, cannot be permitted to be  
D raised and that too for the first time before this Court.”

It was further opined:

“74. In absence of necessary pleadings and grounds taken  
before the High Court, we are not in a position to agree  
with the learned counsel appearing on behalf of the  
E appellants that only because Section 13 of the repealed  
Act is inconsistent with Section 14 of the 2003 Act, the  
same would be arbitrary by reason of being discriminatory  
in nature and ultra vires Article 14 of the Constitution of  
India on the premise that charging section provides for  
F levy of tax on sale and consumption of electrical energy,  
while the exemption provision purports to give power to  
exempt tax on “electricity sold for consumption” and makes  
no corresponding provision for exemption of tax on  
electrical energy self-generated and consumed.”

G 14. In absence of such factual foundation having been  
pleaded, we are of the opinion that no case has been made out for  
declaring the said provision ultra vires the Constitution of India.

H 15. A domestic trader and an exporter stand on different  
footings. The said provisions were made when the country was

undergoing severe 'foreign exchange crunch'. The Parliament in its wisdom has inserted the said provisions so as to prevent fraud. Sub-section (1) of Section 18 of the Act provides for filing of an application for grant of exemption by the Reserve Bank of India. Refusal to give such an exemption is required to be preceded by reasonable opportunity of making a representation.

16. A legal provision does not become unconstitutional only because it provides for a reverse burden. The question as regards burden of proof is procedural in nature. [See *Hiten P. Dalal v. Bratindranath Banerjee*, (2001) 6 SCC 16 and *M.S. Narayana Menon v. State of Kerala*, (2006) 6 SCC 39]

17. The presumption raised against the trader is a rebuttable one. Reverse burden as also statutory presumptions can be raised in several statutes as, for example, the Negotiable Instruments Act, Prevention of Corruption Act, TADA, etc. Presumption is raised only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. In a case of this nature, particularly, when an appeal against the order of the Tribunal is pending, we do not think that the appellants are entitled to take the benefit thereof at this stage. Such contentions must be raised before the criminal court.

18. Commercial expediency or auditing of books of accounts cannot be a ground for questioning the constitutional validity of a Parliamentary Act. If the Parliamentary Act is valid and constitutional, the same cannot be declared ultra vires only because the appellant faces some difficulty in writing off the bad debts in his books of accounts. He may do so. But that does not mean the statute is unconstitutional or the criminal prosecution becomes vitiated in law.

19. An order of discharge can be interfered with by the High Court on limited grounds. At that stage, it need not be shown that the appellants may not ultimately be convicted. It is enough if there exists a strong suspicion.

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A           20. The factual matrix involved in the matter is one of the accounting. The burden being on the appellants to show that they had taken all permissible steps as are provided for under the law, the question of passing any order of discharge at this stage would not arise.

B           21. The export was to the tune of US \$ 55,03,218.78. Appellants on their own showing exported goods to the countries like USA, Canada, France, Indonesia, etc. They did not obtain any general or special permission from the Reserve Bank of India for non-realisation of export proceeds beyond six months which is the period specified under Sub-section (1) of Section C  
18 of the Act.

D           22. As all contentions as to whether the appellants have committed any offence or not shall remain open, we are of the opinion that no case has been made out for interference of the impugned judgment. The appeal is dismissed. No order as to costs.

N.J.

Appeal dismissed.